



1 the parties have filed a Joint Stipulation. After reviewing the matter, the Court  
2 concludes that the decision of the Commissioner should be reversed and remanded.

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4 On December 14, 2000, July, 23, 2002, and August 9, 2002, plaintiff  
5 Douglas A. Wilson filed applications for supplemental security income benefits  
6 (“SSI”) alleging an inability to work since July 1, 2000 due to knee, ankle, and  
7 shoulder pain, cardiac and mental problems. His claims were denied initially, and  
8 upon reconsideration by the Commissioner. A hearing was held on February 5,  
9 2004 (AR 35-68), and on March 25, 2004 an Administrative Law Judge (“ALJ”)  
10 issued a decision affirming the decision of the Commissioner, finding that Plaintiff  
11 was capable of other work (AR 19-28). The decision was affirmed by the Appeals  
12 Council, and Plaintiff appealed to this Court, which reversed on two grounds. The  
13 Court found that the ALJ failed to address and consider the opinions of Dr.  
14 Aquino, an examining physician, constituting error. (AR 659-60). The court also  
15 found that the ALJ failed to address or discredit Plaintiff’s subjective complaints of  
16 fatigue. *Id.* In turn, the Appeals Council remanded the matter to the ALJ for  
17 further proceedings, with direction to consolidate a subsequent application for SSI  
18 filed on April 27, 2006. (AR 664).

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20 On remand, an ALJ found that Plaintiff had the residual functional capacity  
21 to perform the full range of light work physically, but was limited to simple  
22 repetitive tasks mentally. (AR 638-49). The ALJ used Medical-Vocational  
23 Guidelines Rule 202.14 as a basis for finding that Plaintiff could perform other  
24 work. (AR 648). On April 7, 2008, the ALJ determined that Plaintiff did not  
25 suffer from disability. (AR 649).

26 Plaintiff makes three challenges to the ALJ’s determination. Plaintiff alleges  
27 that the ALJ erred by: (1) deviating from the prior residual capacity assessment; (2)  
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1 rejecting Plaintiff's request to cross-examine the consulting psychologist; and (3)  
 2 applying the Medical-Vocational Guidelines despite Plaintiff's severe non-  
 3 exertional impairments.

## 4 5 II. DISCUSSION

### 6 1. Standard of Review

7 Under 42 U.S.C. § 405(g)(1998), the Court reviews the Commissioner's  
 8 decision to determine if: (1) the Commissioner's findings are supported by  
 9 substantial evidence; and (2) the Commissioner used proper legal standards.  
 10 DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence  
 11 means "more than a mere scintilla", Richardson v. Perales, 402 U.S. 389, 401  
 12 (1971), but "less than a preponderance." Desrosiers v. Secretary of Health &  
 13 Human Servs., 846 F.2d 573, 576 (9th Cir. 1988).

14 This court cannot disturb the Commissioner's findings if those findings are  
 15 supported by substantial evidence, even though other evidence may exist which  
 16 supports plaintiff's claim. See Torske v. Richardson, 484 F.2d 59, 60 (9th Cir.  
 17 1973), cert. denied, Torske v. Weinberger, 417 U.S. 933 (1974); Harvey v.  
 18 Richardson, 451 F.2d 589, 590 (9th Cir. 1971). The Court is required to uphold  
 19 the decision of the Commissioner where evidence is susceptible to more than one  
 20 rational interpretation. Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984).

### 21 22 2. Deviation from prior residual functional capacity assessment was permitted

23 When the Appeals Council vacates a final decision of the Commissioner, the  
 24 ALJ must consider all pertinent issues de novo, which means the ALJ is required to  
 25 perform a new five-step sequential evaluation to determine claimant's eligibility  
 26 for disability. Hearings, Appeals and Litigation Law Manual § I-2-8-18. No  
 27 published opinion of the Ninth Circuit has applied the doctrines of law of the case  
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1 or the rule of mandate to preclude ALJs from revisiting issues settled in the district  
2 court's orders. Ishchay v. Barnhart, 383 F.Supp.2d 1199, 1215 (C.D. Cal. 2005).  
3 Thus, in deciding on a claimant's eligibility for disability, the ALJ must consider  
4 all evidence in the record. 20 C.F.R. § 416.920(a)(3).

5 In its Order of Remand, the Court directed the ALJ to give specific and  
6 legitimate reasons for discrediting Plaintiff's complaints of fatigue, and to give  
7 weight to the opinions of Dr. Aquino due to their probative nature. (AR 659-60).  
8 Unlike in Ishchay, where the Order of Remand specifically required a review of the  
9 fifth step in the sequential evaluation, here, the District Court's order required the  
10 ALJ to go back to step two and examine the severity of Plaintiff's impairments by  
11 examining Plaintiff's fatigue testimony and the report of Dr. Aquino. (AR 658-  
12 60). By starting at step two of the sequential evaluation, the ALJ was required to  
13 take in all evidence regarding the Plaintiff's impairments, including a bicycle  
14 accident in 2005 and Plaintiff's testimony at the 2007 hearing.

15  
16 In the case at hand, the ALJ provided specific and legitimate reasons for  
17 changing Plaintiff's residual functional capacity assessment from sedentary to light  
18 work. First, the ALJ noted that his previous residual capacity assessment was  
19 completely unsupported by objective medical evidence, and there was  
20 uncontroverted medical evidence that Plaintiff was capable of performing light  
21 work. (AR 317-24, 444-51, 644). Then, the ALJ looked to the bike riding accident  
22 of 2003 (AR 425-30), and the more recent accident in 2005 (AR 752-63), finding  
23 that such levels of activity were consistent with a residual functional capacity to  
24 perform light work. (AR 645). Finally, as Plaintiff's coronary artery disease had  
25 remained stable, and Plaintiff had been examined and found to have normal blood  
26 pressure (AR 798, 800, 802), the ALJ found that cardiac problems and/or  
27 hypertension were not conditions which prohibited the Plaintiff from performing  
28 light work. (AR 645).

1 With regards to Plaintiff's mental state, the ALJ concluded that Plaintiff  
2 was capable of performing simple repetitive tasks. (AR 644). The ALJ found that  
3 in the absence of drugs and alcohol, Plaintiff had no more than mild limitations on  
4 his ability to interact with others, perform simple tasks, and handle changes in the  
5 workplace; and such limitations were consistent with the mental limitation of  
6 performing simple repetitive tasks. (AR645-46). As Plaintiff had been under the  
7 influence of drugs and alcohol in those instances where he displayed significant  
8 mental problems (AR 425-30, 752-63), the ALJ's conclusion was supported by  
9 evidence in the record. Moreover, the ALJ noted that the state agency psychologist  
10 diagnosed Plaintiff with polysubstance abuse/dependence (AR 895), not psychosis,  
11 and Plaintiff's primary care physicians had not referred Plaintiff for psychiatric  
12 treatment. (AR 645). The ALJ did take into consideration the report of Dr.  
13 Aquino, and found it consistent with Plaintiff's mental ability to perform simple  
14 repetitive tasks (AR 472). (AR 644). Thus, even though the ALJ found that  
15 combined impairments of hypertension and anxiety were severe (AR 641), these  
16 conditions did not limit Plaintiff from the residual functional capacity to perform  
17 simple repetitive tasks, mentally. (AR 644).

18 In light of the absence of medical findings supporting Plaintiff's claims of  
19 physical and mental impairments, the ALJ concluded that there was simply no  
20 objective evidence to support a finding of disability. (AR 646). However, lack of  
21 objective medical evidence alone is not a sufficient basis to discredit Plaintiff's  
22 allegations of pain, and the ALJ must have specific, legitimate reasons to reject  
23 Plaintiff's credibility. See Morgan v. Apfel, 169 F.3d 595 (9th Cir. 1999). Thus,  
24 the ALJ also noted that there were inconsistencies in Plaintiff's statements at the  
25 2007 hearing which lead him to doubt Plaintiff's general credibility. (AR 647,  
26 900-24). For example, the ALJ stated that Plaintiff claimed to have dealings with  
27 former Secretary of Defense Donald Rumsfeld and alleged to be the recipient of a  
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1 Purple Heart (AR 907, 911); neither of which was supported by Plaintiff's record  
2 or his mother. (AR 646). In addition, the ALJ concluded that Plaintiff's credibility  
3 was also eroded by the state agency psychologist's report, which indicated that  
4 Plaintiff produced an invalid MMPI score due to an exaggeration of his psychiatric  
5 symptoms. (AR 647, 894).

6 In conclusion, the ALJ was required to take all evidence in the record into  
7 account when looking to the severity of Plaintiff's impairments and determining  
8 disability. 20 C.F.R. § 416.920(a)(3). In this case, the ALJ looked to the recent  
9 biking accident, new medical reports, and evidence from the 2007 hearing to  
10 determine that a finding of sedentary residual functional capacity was not  
11 supported by objective medical evidence. (AR 644-47). The ALJ had  
12 uncontroverted medical evidence that Plaintiff was capable of performing light  
13 work. (AR 317-24, 444-51, 644). Also, there were legitimate reasons to discredit  
14 Plaintiff's pain allegations, including an invalid MMPI and testimony inconsistent  
15 with the record. (AR 647, 894). Therefore, the ALJ's determination that Plaintiff  
16 had the residual functional capacity to perform light work, physically, and simple  
17 repetitive tasks, mentally, was supported by substantial evidence.

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19 3. Rejection of Plaintiff's request to cross-examine consulting psychologist  
20 was improper

21 Where a physician is a crucial witness whose findings substantially  
22 contradict the other medical testimony, and when interrogatories are an inadequate  
23 substitute for cross-examination, the claimant is denied procedural due process  
24 when the request for cross-examination is not granted. Solis v. Schweiker, 719  
25 F.2d 301 (9th Cir. 1983).

26 Plaintiff alleges that the ALJ's denial of a request to cross-examine  
27 consulting psychologist, Dr. Brawer, was improper because the ALJ relied on his  
28 report to contradict Plaintiff's history of delusional behavior, and interrogatories

1 were not a proper substitute. (Joint Stipulation at 19-20).

2       The record on remand in this case indicated a history of delusional behavior  
3 and mental illness. (AR 425-30, 752-63). On February 19, 2003, Plaintiff was  
4 involuntarily admitted to the hospital, when an “agitated, irritable, and psychotic”  
5 Plaintiff threatened police. (AR 425). The treating physician, Said Jacob,  
6 diagnosed Plaintiff with major depression, severe, with psychotic features. Id.  
7 During the same hospitalization another treating physician, Laura Lai, diagnosed  
8 Plaintiff with psychosis, not otherwise specified. (AR 428). Two years later, on  
9 September 1, 2005, Plaintiff was again involuntarily hospitalized after police found  
10 him with a false badge trying to make a “citizen’s arrest” as an FBI agent. (AR  
11 752). While under the care of treating physician Hassan Farrang, Plaintiff admitted  
12 to hearing voices and was diagnosed with psychosis, not otherwise specified. (AR  
13 753). The Plaintiff also has continued difficulties with anxiety, for which he  
14 receives medication. (AR 812, 814, 816, 820, 824, 826, 827, 829, and 831).  
15 Finally, the ALJ himself called Plaintiff’s testimony at the 2007 hearing “frankly  
16 bizarre” in light of Plaintiff’s claims that he had dealings with former Secretary of  
17 Defense Donald Rumsfeld and spoke an Indian dialect unknown to translators.  
18 (AR 642, 907).

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20       However, the ALJ did not find Plaintiff’s mental problems to be disabling  
21 because they were infrequent, associated with drugs and alcohol, and not supported  
22 by the findings of consulting psychologist, Dr. Brawer. (See 642, 645-47). The  
23 ALJ noted that Plaintiff was hospitalized for psychotic behavior on two occasions,  
24 and on both occasions he was better after detoxification. (AR 644). The ALJ also  
25 noted that despite diagnosing Plaintiff with anxiety on several occasions (AR 812,  
26 814, 816), Plaintiff’s primary care physicians never referred him for psychiatric  
27 treatment. (AR 645). In addition, the ALJ found that evidence of Plaintiff’s  
28 mental problems was contradicted by Dr. Brawer’s report in July 2007 which

1 stated that Plaintiff only had polysubstance abuse/dependence and a depressive  
2 disorder and no evidence of a reality contact disorder. (AR 642, 645). Thus, the  
3 ALJ did significantly rely on the findings of Dr. Brawer to discredit evidence of  
4 mental problems. (AR 642).

5       Moreover, the ALJ relied on Dr. Brawer's MMPI test and Plaintiff's  
6 mother's report in order to undermine Plaintiff's credibility regarding mental  
7 problems. (See 646-47). The ALJ questioned Plaintiff's credibility regarding his  
8 complaints of mental problems by noting a report by Dr. Brawer in which Plaintiff  
9 produced an invalid MMPI score indicating an extreme exaggeration of psychiatric  
10 symptoms. (AR 647). The ALJ also found that Plaintiff's credibility is  
11 undermined by his mother, Margaret Wilson, who does not state that her son  
12 suffers from psychosis. (AR 647). However, Plaintiff's mother admitted that she  
13 only spends a few hours per week with her son, and there is no evidence that  
14 Margaret Wilson is a licensed doctor. (AR702-09).

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16       Here, Plaintiff demonstrated a history of mental problems and the ALJ relied  
17 on Dr. Brawer's findings not only to disprove evidence of mental problems, but  
18 also to undermine Plaintiff's credibility regarding his mental problems. (AR 642,  
19 645, 647). The ALJ expressly stated that he did not permit cross-examination  
20 because the findings of Dr. Brawer did not provide the basis for his decision in this  
21 case. (AR 642). However, the ALJ clearly relied on the findings of Dr. Brawer,  
22 and it was improper to deny Plaintiff the opportunity for cross-examination.

23       In conclusion, the case is reversed and remanded in order to give Plaintiff  
24 the opportunity to cross-examine Dr. Brawer.

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27                                   III.    ORDER  
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1 For the foregoing reasons, the decision of the Commissioner is reversed and  
2 remanded pursuant to sentence four of 42 U.S.C. § 405(g).

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4 Date: July 30, 2009

5 /s/  
6 STEPHEN J. HILLMAN  
7 UNITED STATES MAGISTRATE JUDGE  
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